United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with affidavit of mailing

76-1101

B
pgs

To be argued by
HERBERT G. JOHNSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1101

UNITED STATES OF AMERICA,
Appellee,

—against—

CHARLES ROBERT THOMAS III,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HERBERT G. JOHNSON,
Assistant United States Attorney,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1101

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES ROBERT THOMAS III,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Charles Robert Thomas III appeals from an order entered on February 19, 1976, in the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino, District Judge) denying his motion made under Rule 35 of the Federal Rules of Criminal Procedure for reduction of sentence.

On September 17, 1976, appellant Thomas pled guilty to six counts of a multi-defendant indictment charging him with twenty-eight counts of interstate transportation of stolen motor vehicles and conspiracy to transport such vehicles, in violation of 18 U.S.C. § 2312 and § 371.

On November 24, 1974, appellant was sentenced to terms of confinement of three years under 18 U.S.C. § 4208(a)(2) on each count, all such terms to run concurrently.

On December 31, 1975, appellant through new counsel filed a motion under Rule 35 to reduce his sentence, which motion was argued before Judge Costantino on January 2, 1976. By memorandum and order dated February 19, 1976, Judge Costantino denied such motion. In the instant appeal, appellant asks this Court to reverse the denial below of his Rule 35 motion, to vacate his sentence and to remand the case to the District Court for the preparation of a new presentence report and for re-sentencing.

Statement of the Case

On April 22, 1975, a thirty-count sealed indictment was handed up by a federal grand jury in the Eastern District of New York charging appellant Thomas and ten others in various counts with violation of Title 18, United States Code, Section 2312 (interstate transportation of stolen motor vehicles), Section 2313 (sale and disposition of stolen motor vehicles which constitute interstate commerce) and Section 371 (conspiracy to transport stolen motor vehicles in interstate commerce)[1] (A. 59-73).[2] On April 24, 1975, appellant appeared with counsel before Judge Costantino and entered a plea of not guilty. He was released upon a personal recognizance bond in the amount of $5,000.

On September 17, 1975, after five co-defendants had entered guilty pleas to various counts of the indictment, appellant again appeared with counsel before Judge Cos-

---

[1] Appellant was named (either alone or together with other defendants) in 28 of the 30 counts in the indictment.

[2] References preceded by "A" refer to pages of appellant's Appendix. References preceded by "G" refer to pages of the Government's Appendix.

tantino and, after being advised of his rights, withdrew his plea of not guilty and entered a plea of guilty to Counts 1, 3, 4, 5, 6, and 7 of the indictment. Sentencing was adjourned pending the preparation of a presentence report by the Department of Probation and bail was continued.

On November 7, 1975, appellant was scheduled for resentencing; at the request of his counsel, however, sentencing was adjourned to November 24, 1975. On the latter date, appellant appeared before Judge Costantino. After appellant had reviewed the presentence report [3] with his counsel, both addressed the Court at some length (A. 2-18). The Court then imposed a sentence of three years imprisonment on each of the six counts to which appellant had pled guilty, all to be served concurrently; no fine was imposed (A. 17). On motion of the Government the remaining counts of the indictment in which appellant was named (Counts 8 through 29, inclusive) were dismissed. *Id.* At the appellant's request, he was granted until December 1, 1975, to surrender (A. 18).

On December 1, 1975, Judge Costantino granted appellant's request that his time to surrender be further extended to January 5, 1976. On December 31, 1975, appellant through new counsel (who now represent appellant on this appeal) filed a motion under Rule 35 for "an order vacating the sentence . . . and placing [appellant] on probation; or, modifying and reducing the sentence" or, in the alternative, for an evidentiary hearing

---

[3] Copies of the presentence report and a "supplemental presentence report" (*see* p. 4, *infra*) have been furnished to this Court and to counsel for appellant under separate cover.

(A. 19). On January 2, 1976, appellant appeared (with his new counsel) once again before Judge Costantino. After extended argument on the motion, the Court reserved decision until the following Monday (January 5, 1976). (G. 1-17). On the latter date Judge Costantino ordered that the Department of Probation undertake a further investigation with respect to matters raised by appellant at the January 2 court appearance and to prepare a supplemental presentence report [4] with respect thereto. Execution of sentence was stayed pending completion and submission of that report.

Upon completion and submission to the District Court of the supplemental presentence report counsel for appellant was given an opportunity to review and comment thereon; a letter from counsel dated February 6, 1976, was submitted to the Court (G. 18-19). After consideration of both the supplemental report and counsel's letter, Judge Costantino, by memorandum and order filed on February 19, 1976, denied appellant's Rule 35 motion and ordered him finally to surrender by February 23, 1976, to begin serving his sentence (A. 47-48).[5]

On February 27, 1976, appellant filed in this Court a notice of appeal from the order denying his Rule 35 motion. On March 1, 1976, appellant's counsel made an oral motion in the District Court for bail pending such appeal. After a hearing held on that date, Judge Costantino denied the motion for bail and appellant then surrendered to the United States Marshal to begin serving his sentence (A. 49-58). On March 2, 1976, counsel for

---

[4] *See* note 3, p. 3, *supra*.

[5] This surrender date was again subsequently extended by Judge Costantino at appellant's request first to February 27, 1976, and then to March 1, 1976.

appellant filed a motion in this Court for an order under Rule 9(b) of the Federal Rules of Appellate Procedure and 18 U.S.C. § 3148(a) admitting appellant to bail pending determination of this appeal. After argument before a panel of this Court[6] on March 16, 1976, that motion was denied from the bench without opinion.

ARGUMENT

POINT I

No evidentiary hearing was required to be held upon appellant's Rule 35 motion.

It is well-settled law that a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure is addressed to the sound discretion of the trial judge. *See, e.g. United States* v. *Jones*, 444 F.2d 89, 90 (2d Cir. 1971). No evidentiary hearing need be held upon such motion. *United States* v. *Foss*, 501 F.2d 522, 529 (1st Cir. 1974); *United States* v. *Garrick*, 399 F.2d 685 (4th Cir. 1968); *United States* v. *Sanders*, 438 F.2d 344, 345 (5th Cir. 1971); *United States* v. *Krueger*, 454 F.2d 1154, 1155 (9th Cir. 1972); *United States* v. *Donohue*, 458 F.2d 237, 239-40 (10th Cir.), *cert. denied*, 409 U.S. 865 (1972); *c.f. United States* v. *Rosner*, 485 F.2d 1213, 1230-31 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Needles*, 472 F.2d 652, 657- (2d Cir. 1973); *Manley* v. *United States*, 432 F.2d 1241, 1245 (2d Cir. 1970) (en banc); *United States* v. *Malcolm*, 432 F.2d 809, 817 (2d Cir. 1970).

---

[6] The Honorable William H. Mulligan and the Honorable Murray I. Gurfein, Circuit Judges, and the Honorable Charles E. Wyzanski, United States District Judge for the District of Massachusetts, sitting by designation.

Even were the above not clearly so, the instant case is not one in which the District Court Judge should have exercised his discretion to allow such hearing. Appellant and his then counsel each were allowed at the time of sentencing to address the Court and to present information in mitigation of punishment, and both did so (A. 2-18). The fair opportunity (in a manner within the reasonable discretion of the District Judge) to rebut the presentence report and to offer further relevant information, which the appellant received, was all that he was entitled to. Fed. R. Crim. P. 32(a)(1); *Green* v. *United States*, 365 U.S. 301, 304-05 (1961) (*semble*); *United States* v. *Aloi*, 511 F.2d 585, 601-02 (2d Cir.), *cert. denied*, 96 S. Ct. 447 (1975); *United States* v. *Rosner*, *supra*, 485 F.2d at 1230; *United States* v. *Needles*, *supra*, 472 F.2d at 657; *United States* v. *Malcolm*, *supra*, 432 F.2d at 817-18; *United States* v. *Espinoza*, 481 F.2d 553 557 (5th Cir. 1973).

In fact, however, no request was made at the time of sentencing that additional testimony or evidence (beyond the statements made to the Court by appellant and his counsel) be allowed or sought either in rebuttal to the presentence report or in mitigation of the sentence (A. 2-18). Such failure in and of itself would have been justification for the District Court to have precluded the raising of such issues when the Rule 35 motion was later argued. *United States* v. *Foss*, *supra*, 501 F.2d at 530. However, Judge Costantino nonetheless allowed counsel at that time to reargue at length issues presented at the time of sentencing, in particular, appellant's asserted rehabilitation and his reputation and standing in the East Hampton, New York, community where he lived (G. 1-17). In addition to a 24-page memorandum in support of the motion (A. 22-45), appellant submitted a petition in his behalf signed by his business customers

(G. 3, A. 43).[7] After considering the arguments on the motion, Judge Costantino took the relatively unusual step of ordering the Department of Probation to prepare a supplemental presentence[8] report investigating and reporting further upon the issues raised by appellant in his Rule 35 motion. Appellant's counsel reviewed such supplemental report and, apparently after discussing that report with appellant, submitted a letter to Judge Costantino in response thereto (G. 18-19). With all of the above before him, Judge Costantino was fully informed when on February 19, 1976, he issued his memorandum and order denying appellant's motion for reduction of sentence.

Judge Costantino's decision was well within the broad discretion which a District Court Judge is granted in matters concerning sentencing. *See*, Point III, *infra*, p. 10. This is not a case like *United States*, v. *Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972), cited on page 7 of appellant's brief, where the District Judge clearly had relied upon hearsay of an unnamed informant in assessing the maximum penalty under the statute despite the defendant's vigorous protestation at the time of sentencing that such hearsay was inaccurate. Here neither appellant nor his counsel at the

---

[7] In his brief, appellant claims that he requested an opportunity to present witnesses at the Rule 35 hearing on January 2, 1976, which request was denied by Judge Costantino (Appellant's brief, p. 7). In fact, appellant's Rule 35 motion papers and the transcript of the January 2 hearing show that appellant's counsel merely advised the Court that such persons were willing to testify if the Court so desired (A. 29; G. 3, 6). *See, United States* v. *Williams*, 499 F.2d 52, 55 (1st Cir. 1974). But such distinction is of course irrelevant here. Judge Costantino received a petition signed by such witnesses and, as set forth below, by his order the Probation Department subsequently interviewed several of such persons and included a summary of such interviews in the supplemental presentence report.

[8] We so denominate that report here, although it was of course prepared and submitted to the District Court *after* appellant had been sentenced (although before he had surrendered).

time of sentencing disputed the substance of the presentence report [9] but rather only that it did not adequately reflect the rehabilitative changes in appellant since his incarceration on two state convictions which occurred prior to his indictment on federal charges (A. 5-8). *But see United States* v. *James*, 459 F.2d 443, 445 (5th Cir.), *cert. denied*, 409 U.S. 872 (1972). Furthermore, the sentence in this case (3 years imprisonment) was well below the maximum (5 years on each of six counts to which appellant pled guilty) which could have been imposed.

The situation here is also clearly distinguishable from cases in which appellate courts have held invalid sentences which were based upon "extensively and materially false" information concerning a defendant's criminal record which he had "no opportunity to correct" *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), or upon "misinformation of constitutional magnitude", *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); *United States* v. *Needles*, *supra*, 472 F.2d at 657; *United States* v. *Malcolm*, *supra*, 432 F.2d at 816, or upon failure of the Court to receive and consider mitigating circumstances, *United States* v. *Malcolm*, *supra*, 432 F.2d at 818; *United States* v. *Brown*, *supra*, 479 F.2d at 1173.

---

[9] Counsel did dispute the statement in the presentence report that appellant had refused to cooperate with the Government (A. 13-14). The Assistant United States Attorney at that time could not refute such claim because he had not been assigned the case at the time such cooperation was alleged to have been offered (A. 11-12). However, at the later Rule 35 hearing, after the Assistant United States Attorney had had an opportunity to investigate such claims, he stated emphatically the Government's position that there had been no offer of cooperation. (G. 13). Counsel for appellant did not attempt to refute that statement (G. 14).

Finally, it should be noted that each statement in a presentence report is not required to be established or refuted by presentation of evidence. *United States* v. *Needles*, *supra*, 472 F.2d at 658. A sentencing judge is bound to consider "the fullest information possible" (of varying probity and regardless of admissibility at trial) concerning the defendant. *Williams* v. *New York*, 337 U.S. 241, 247 (1949); *Gregg* v. *United States*, 394 U.S. 489, 492 (1969); *Williams* v. *Oklahoma*, 358 U.S. 576, 585 (1959); *United States* v. *Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.) (sentencing court should consider "the unfavorable, as well as the favorable data"), *cert. denied*, 382 U.S. 843 (1965); *United States* v. *Schipani*, 315 F. Supp. 253, 255-56 (E.D.N.Y.), *aff'd*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971). We submit that that is exactly what Judge Costantino, after making special efforts to see that he was considering all of the facts which he could reasonably obtain, did prior to deciding the Rule 35 motion below in this case.

POINT II

The District Court Judge was not required to set forth the grounds upon which he denied appellant's Rule 35 motion.

Concomitant with the broad discretion entrusted to a District Court Judge in determining a Rule 35 motion (*see* Point I, *supra*, p. 5), it is clear under the law of this Circuit that he is under no obligation to set forth the reasons for his decision. *United States* v. *Driscoll*, 496 F.2d 252 (2d Cir. 1974); *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Brown*, *supra*, 479 F.2d at 1172-73; *McGee* v. *United States*, 462 F.2d 243, 247 (2d Cir. 1972); *United States* v. *Ursini*, 296 F. Supp. 1152, 1153 (D. Conn. 1968); *cf.*

United States v. *Kaylor*, 491 F.2d 1133, 1139 (2d Cir.) (en banc), *vacated on other grounds*, 418 U.S. 909 (1974).[10]

POINT III

The District Court Judge acted within his discretion in imposing sentence upon appellant.

It is clear that a District Court Judge is afforded great discretion in sentencing and that a sentence which is within the legal maximum will be disturbed only upon extraordinary circumstances of a kind not present here. *Dorszynski* v. *United States*, 418 U.S. 424, 440-41 (1974); *United States* v. *Tucker*, *supra*, 404 U.S. at 447; *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *United States* v. *Brown*, *supra*, 479 F.2d at 1172; *McGee* v. *United States*, *supra*, 462 F.2d at 245; *United States* v. *Sweig*, *supra*, 454 F.2d at 183-84; *United States* v. *Foss*, *supra*, 501 F.2d at 527. In fulfilling the exacting task of fixing sentence, he may consider a number of factors promoting several subjective and often necessarily conflicting goals, in addition to rehabilitation of the offender; such as general or specific deterrence, protection of potential victims and maintenance of respect for legal norms. *United States* v. *Schipani*, *supra*, 315 F. Supp. at 255 (and authorities cited therein). Certainly rehabilitation cannot be the only factor which a sentencing District

---

[10] It should be noted that neither at the time of sentencing nor at the argument on the Rule 35 motion did the appellant request the Court to set forth the grounds for the appellant's sentence. *United States* v. *Velazquez*, *supra*, 482 F.2d at 142. In fact, even at the March 2, 1976, hearing, appellant appeared to be requesting only that the Court set forth its reasons for the denial of his motion for bail pending appeal (A. 57).

Judge may or should take into account, and general and specific deterrence are valid considerations. *United States* v. *Velazquez*, *supra*, 482 F.2d at 141; *United States* v. *Foss*, *supra*, 501 F.2d at 527; *see also Pell* v. *Procunier*, 417 U.S. 817, 822-23 (1974). Mr. Justice Frankfurter's observation of some years ago remains appropriate in the context here presented:

> "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility . . ., these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. . . . This Court has no such power." *Gore* v. *United States*, *supra*, 357 U.S. at 393.

There is no room in this case for the argument that Judge Costantino failed to fit an individualized sentence to appellant.[11] Both the number of proceedings below at and subsequent to the time of sentencing, and the statements by the District Court Judge which permeate the record of those proceedings (*see, e.g.*, A. 14-16, G. 7-1[illegible] A. 52-55, 57), amply demonstrate that the sentence was fitted to the particular offender and that the District Court did not employ the kind of "fixed and mechanical

---

[11] The seriousness of appellant's argument on this point must be questioned when at page 16 of his brief he contends that a co-defendant (William Barth) received a lighter sentence. Appellant's frivolous contention that William Barth's three year prison sentence cannot be considered custodial because it was to be served concurrently with a prior federal sentence requires no answer. In fact, William Barth and Charles Thomas, the principals in this case, received the heaviest, though not identical, sentences.

approach" in imposing sentence which has been condemned by this Court. *See United States* v. *Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974); *United States* v. *Baker*, 487 F.2d 360, 361 (2d Cir. 1973); *Williams* v. *Oklahoma*, *supra*, 358 U.S. at 585; *Williams* v. *New York*, *supra*, 337 U.S. at 247-50. In the course of all of the sentencing proceedings below, Judge Costantino bent over backwards to give appellant every consideration and every opportunity to present his side of the matter; it is difficult to understand what more appellant would have had Judge Costantino do, other than to abrogate completely his sentencing responsibilities in this case.

CONCLUSION

The Memorandum and Order of the District Court Judge dated February 19, 1976, denying the motion made by the appellant Charles Robert Thomas III under Rule 35 of the Federal Rules of Criminal Procedure for reduction of sentence, should be affirmed.

Dated: June 16, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HERBERT G. JOHNSON,
Assistant United States Attorney,
Of Counsel.

★ U. S. Government Printing Office 1976— 614—353—221

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 18th day of June 1976 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Siegel & Graber, Esqs.
100 Church Street
New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Avenue~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

18th day of June 1976

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1977